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The Commerce Clause of the Federal Constitution. By FREDERICK H. COOKE. (New York: Baker, Voorhis and Co., 1908. Pp. xcii, 302).

In his preface Mr. Cooke laments the lack of unifying principles in the decisions under the commerce clause. "It seems desirable, therefore," he says, "that one at all comprehensively writing on the subject should at least attempt to make a statement of such principles." The carrying out of this aim makes the text an essay on what the law ought to be, rather than a textbook of the law. Of more practical value are the foot-notes, which occupy about two-thirds of the main body of the book.

Mr. Cooke presents the following definition of "commerce" in the commerce clause: "Commerce consists in transportation, (not necessarily all transportation, but certainly) including transportation of persons, tangible property, and (at least under certain conditions) of intelligence." The sole merit of this definition is that it emphasizes transportation as an essential element. The definition is poorly expressed, in not clearly including contracts involving transportation, which the author means to include. It would seem, also, that the word transportation must be qualified; for there is no reason to believe that transportation otherwise than in the course of business—as, for instance, driving or motoring across a state line for pleasure—should be included. Moreover, the inclusion of all contracts involving transportation is too broad. This is not merely a fault of expression; it is due to a radically mistaken view on the part of Mr. Cooke. In his opinion, insurance contracts between persons in different States are interstate commerce, if not because commercial intercourse, certainly because involving transportation of the policies. So, also, he criticizes *Williams v. Fears* (179 U. S., 270), in which the business of hiring laborers to be employed beyond the State was held not subject to the commerce clause, although concededly transportation must take place as the result of such contracts. What is the distinction, he asks, between this case and that of a contract of sale of personal property to be transported from one State to another? The answer is, of course, that in *Williams v. Fears* as in the case of insurance contracts, transportation is purely collateral to the contract; the subject of transportation is not the subject of the contract. Hence, although the transportation of the insurance policies and of the laborers is within the scope of the commerce clause, the contracts of insurance and for the performance of labor are not.

The original package doctrine Mr. Cooke characterizes as anomalous and absurd. "This seems," he says, "about as reasonable as to hold

that an interstate passenger continues under the shelter of the commerce clause until, by a change from his traveling raiment, he has been commingled with the general mass of population."

As a test of the validity of congressional regulation of the conduct and liability of those engaged in commerce, Mr. Cooke presents the rule that such regulation must be "for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause." Under this rule, the employers' liability acts passed by congress are invalid, as for the benefit of the employees only, and not directly affecting commerce at all.

Mr. Cooke rejects the distinction sought to be made between "matters of local interest" and "matters of national interest," and contends that in no case may commerce within the scope of the commerce clause properly be regulated by a State. It is true, he says, that state action may affect such commerce; but in every such case this is merely under authority of a State, not to regulate such commerce, but to exercise some reserved power. "Such reserved powers may be resolved into a few tolerably well-defined classes, so far as concerns their effect upon such commerce: (1) to establish and maintain means of transportation; (2) to control persons and property; (3) to regulate the conduct and liability of those engaged in transportation; to which may properly be added the power of taxation." As for corporations, Mr. Cooke's opinion is that the general power of the States to regulate their own corporations, and to regulate, even to the extent of exclusion, foreign corporations, should extend to the regulation of commerce within the scope of the commerce clause when engaged in by corporations. He recognizes, of course, as well established, the contrary rule, that the States have no greater control over such commerce when engaged in by corporations than when engaged in by individuals.

Mr. Cooke's view is that it should not be held within the power of a State to authorize the engaging in commerce within the scope of the commerce clause—so as, for instance, to enable a railroad corporation to extend its lines beyond the borders of the chartering State for interstate transportation, except through the comity of the neighboring State. Mr. Cooke's whole position upon the subject of corporations engaged in commerce within the scope of the commerce clause seems due to a fundamental misconception. He is right in holding that a State cannot authorize the engaging in such commerce; he fails to see that no such authority is necessary. A State can charter a corporation for any purpose; such a corporation can then, like an individual, engage in

commerce within the scope of the commerce clause, subject only to restrictions by Congress.

Upon the subject of state control of persons and property, Mr. Cooke presents the view that "if the State has power to prohibit or otherwise regulate the production, sale, or use of property within its territory, it then follows, so far at least as necessary to a complete exercise of such power, that it is incidentally within the power of the State to regulate, even to the extent of prohibition, transportation thereof into, or it may be out of, the State." This view brings him into interesting conflict with the supreme court upon the subject of intoxicating liquors, which he thinks it is plainly, as in the case of other articles possessing deleterious qualities, within the power of the State to exclude. His argument upon this point is full and convincing. The Wilson act, assuming that the control it allows to the States is not otherwise within their powers, he denounces as an unconstitutional delegation of congressional power to the States.

As stated above, Mr. Cooke would limit the power of congress to regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause to regulation for the benefit of those enjoying the benefit of such transportation. The power of the States he would limit to regulation for the benefit of the public, or of those enjoying the benefit of transportation wholly within the State; he would exclude State regulation solely for the benefit of those enjoying the benefit of transportation with the scope of the commerce clause. This view conflicts, of course, with the decisions sustaining such state action as requiring the stopping of trains for the benefit of interstate passengers only, or regulating liability for loss or injury suffered by those enjoying the benefit of interstate transportation.

Upon the question of the validity, so far as the commerce clause is concerned, of state taxation, as property, of property concerned in commerce within the scope of the commerce clause, Mr. Cooke presents the simple test of whether such property is within the territorial jurisdiction of the State. It being properly established that property is not exempt because employed in such transportation, he sees no reason to exempt property acquired through such transportation, i.e., the receipts or earnings. The contrary is, of course, established; yet in glaring inconsistency, says Mr. Cooke, with this rule, State taxation is sustained upon the capital stock or other valuation including the franchise value arising out of use in transportation within the scope of the commerce clause.

Upon the whole, Mr. Cooke's book is a valuable work, though it would

have been more useful to attempt to find what underlying principles run through the cases as decided, than to state the author's personal views. Yet his free criticism is refreshing, and will no doubt, as he expresses the hope, "assist toward an ascertainment of the truth." Roughly speaking, Prentice and Egan may be characterized as a good pioneer treatise, Calvert as sticking too closely to a mere statement of the cases, Cooke as going to the other extreme. In a way, therefore, the three books supplement each other, and together prepare the way for a first-class treatise upon the law of the commerce clause.

KARL SINGEWALD.

Constitutional Government in the United States. By WOODROW WILSON. (New York: Columbia University Press. 1908. Pp. 236.)

This volume consists of a series of eight lectures delivered by President Woodrow Wilson at Columbia University in 1907 under the George Blumenthal foundation. In the prefatory note Dr. Wilson states that the lectures are not to be regarded as a systematic discussion of the government of the United States. The topics discussed in these lectures are Constitutional Government, the Place of the United States in the Development of Constitutional Government, the President, the House, the Senate, the Courts, the Relation of the States to the Federal Government, and Party Government.

Each of the lectures could be expanded into a good sized volume, so that one need not expect to find an exhaustive treatment of the topics discussed. They serve a very valuable purpose, however, in that one can here find in small compass a general outline of the character and operation of constitutional government as exhibited by the government of the United States. Dr. Wilson has succeeded in his purpose, for there is presented here the more salient features of constitutional government, and his analysis of the position of the United States in constitutional development is admirably done. He calls attention to a fact so often lost sight of that constitutional government does not mean merely a government conducted according to the provisions of a definite constitution, but that it is one "whose powers have been adopted to the interests of its people and to the maintenance of individual liberty." The contribution of the United States to constitutional government, according to Dr. Wilson, is the federal system, the system under which all power is not concentrated in the federal government, but under which all the